No. 90-542

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

AMERICAN MEDICAL ASSOCIATION,

Petitioner,

v.

CHESTER A. WILK, D.C.,
JAMES W. BRYDEN, D.C.,
PATRICIA B. ARTHUR, D.C. and
MICHAEL D. PEDIGO, D.C.,

Respondents.

Petition For A Writ Of Certiorari To
The United States Court Of Appeals For The Seventh Circuit

REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

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TABLE OF AUTHORITIES

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Respondents' opposition agrees that the Seventh Circuit's decision should be reviewed. Opp. 2 & 23-30. Respondents agree that the courts of appeals are deeply divided on the standards that apply to antitrust challenges to activities of professional associations, trade associations, and standard-setting bodies. They further agree that it is a matter of national importance that the Court resolve the conflict in this case.

For this reason, this Reply will be confined to addressing respondents' suggestion that the case presents somewhat different questions than are presented in the petition. Respondents are confused. Although they may defend their judgment on any ground that they choose, the questions presented in the Petition

rest on two explicit lower court findings that would have required entry of judgment for the AMA if this case had arisen in the Third, Fifth, or Ninth Circuits. Indeed, in urging reformulation of these questions, respondents are simply challenging these findings and otherwise arguing that the Seventh Circuit reached the right result for the wrong reasons. Opp. 3-8, 15-17 & 23-30.

1. The first question that the Petition presents is whether a professional ethical guideline against the use of unscientific, dangerous, or fraudulent practices can be held to violate the Sherman Act simply because it has an adverse effect on the unscientific practitioners.

Here, it is undisputed that the AMA ethical guidelines at issue had no effect on the pricing of physicians' services (or health care services generally). Thus, contrary to respondents' claim (Opp. 23-26), the guideline is the antithesis of the "naked" restraints on price that this Court condemned in *National Society of Professional Engineers* v. *United States,* 435 U.S. 679 (1978), and *FTC* v. *Superior Court Trial Lawyers Assn,* 110 S. Ct. 768 (1990). As the lower courts stated (App. 76a), plaintiffs did not offer—and could not offer—any evidence that the guidelines adversely affected industry-wide output.[1]

Two lower courts findings are thus critical: (1) that the guideline was adopted and maintained for the "primary purpose" of promoting the quality and reliability of services that physicians *compete* to provide to patients and of *thereby promoting the more*

[1]The only effect of the AMA guidelines was that M.D.'s would refer patients needing manipulative therapy to physical therapists, osteopaths, and others—such that demand for services was merely shifted to non-M.D.'s other than chiropractors and that there was no effect on industry-wide output. Correlatively, the guidelines concededly had no effect on the pricing of services by the nation's over 500,000 physicians (who compete vigorously with each other) or on the pricing of services by osteopaths, physical therapists, and other providers of manipulative therapies.

efficient functioning of the market (App. 81a & 86a),[2] and (2) that any adverse effects on chiropractors were entirely incidental to physicians' adherence to guidelines elevating the quality of their own services (App. 166a; *see* App. 74a).

As respondents cannot seriously dispute, these two findings would have required the entry of judgment for the AMA under the rule of reason holdings of the Third, Fifth, and Ninth Circuits.[3] These courts follow Professors Bork, Areeda, and Sullivan.[4] They unequivocally reject the Seventh Circuit's holding that

[2]Contrary to respondents' claim (Opp. 23), the AMA does not assert "that it could not have violated the antitrust laws because its purpose was to promote health, safety, and the quality of professional service." Rather, the AMA submits that given these purposes—and the fact that such non-price guidelines can promote the efficient functioning of markets—its guidelines may not be condemned absent proof of adverse effect on competition in a relevant market.

[3]*See, e.g., Neeld* v. *National Hockey League,* 594 F.2d 1297 (9th Cir. 1979); *Hatley* v. *American Quarter Horse Ass'n,* 552 F.2d 646 (5th Cir. 1977); *Tripoli Co.* v. *Wella Corp.,* 425 F.2d 932 (3d Cir. 1970) (en banc).

Contrary to respondents' perfunctory attempts to distinguish these cases (Opp. 26 n.9), they did not merely reject application of a *per se* rule to the "boycotts" at issue. Each decision went on to hold that, under the rule of reason, non-price restraints are valid when, as there and as here, their "primary purpose" is to improve the quality and marketability of a product and any adverse effects on individual competitors are "incidental" to the operation of guidelines that attain that purpose. *See Neeld,* 594 F.2d at 1300; *Hatley,* 552 F.2d at 653; *Tripoli,* 425 F.2d at 936; Petition, pp. 15-23.

Similarly, there is no substance to respondents' suggestion that this rule is limited to "sport leagues." Opp. 26 n.9. As Judge Bork has stated —and this Court has recognized—activities that promote the quality or reliability of services without affecting price are beneficial and the principle that upholds such conduct is "by no means confined to sports." R. Bork, *The Antitrust Paradox,* p. 338 (1978); *see* Petition, pp. 17-19 (discussing *Professional Engineers* and other decisions of this Court).

[4]R. Bork, *The Antitrust Paradox,* pp. 330-46 (1978); P. Areeda, *Antitrust Law,* Vol. VII, ¶¶ 1500-1511 (1986); L. Sullivan, *Antitrust,* pp. 275-82 (1977); *see* Petition, pp. 15-23.

the adverse effects of guidelines on the costs and demand for services of one group of *competitors* can establish harm to *competition* and justify a "modified" rule of reason in which the defendant must bear the nearly impossible burden of proving, *inter alia,* that its action was the "least restrictive" alternative.[5]

Respondents' arguments that the questions should be reformulated, in turn, are simply challenges to the factual findings that would entitle the AMA to judgment under the decisions of this Court and the holdings of the Third, Fifth, and Ninth Circuits. There is no substance to respondents' claims.

First, the Opposition (pp. 3-8) makes a series of allegations that the AMA guidelines were not designed to improve the quality of physicians' care and to "creat[e] efficiency," but were a sham and a "disguised naked restraint" aimed at "destroying or coercing rivals by means that do not benefit consumers." R. Bork, *The Antitrust Paradox,* p. 334. However, the District Court rejected these allegations and found that the AMA genuinely believed chiropractic was dangerous quackery and that its predominant purpose was to improve the quality of physicians' services and to promote efficiency. App. 81a, 86a.

In this regard, respondents misstate the record in suggesting (Opp. 3-8) that the challenged guideline had something to do with the efficacy of manipulative therapy for back and musculoskeletal ailments, for the AMA guidelines have long authorized referral and other joint practice relationships with physical therapists, osteopaths, and other scientific practitioners of these treatments.[6]

[5]While respondents do not agree with the rule that other courts have adopted, they acknowledge that the Seventh Circuit's "modified" rule of reason is "in sharp conflict with the rulings of the Court" and the holdings of other courts of appeals. Opp. 27.

[6]Indeed, AMA witnesses testified at trial that they have no problem with chiropractors who confine themselves to accepted physical therapy treatments for musculoskeletal conditions and that the AMA eliminated

The sole reason the former guidelines treated chiropractors differently was that all or virtually all chiropractors then adhered to the patently unscientific theory that misalignments of the spinal column cause disease and held themselves out as "family doctors" who can diagnose, prevent, and cure polio, heart disease, diabetes, and other diseases by manipulating the spine. *See* Petition, pp. 4-5, 6-7 & n.3.

Second, respondents also argue at length that the adverse effects on chiropractors' incomes were not "indirect" and "incidental," but that the guidelines operated "to exclude chiropractors from the market" by "persuading or coercing suppliers or customers to deny relationships the [chiropractors] need in the competitive struggle." Opp. 17-19 & 29 (citations omitted). Again, the lower courts found precisely the opposite. They found that the effects on chiropractors' incomes were incidental to the AMA members' adherence to guidelines designed to promote the quality of their own services and that those guidelines thus had no effect on chiropractors' ability to obtain "inputs" from suppliers (*e.g.*, providers of x-ray machines) or to attract patients. App. 166a; *see* Petition p. 20.

The fact that the adherence of AMA members to ethical guidelines could not exclude chiropractors from the market is conclusively demonstrated by the lower courts' findings that chiropractic grew rapidly, by any measure, during the period of the so-called boycott. *See* App. 74a. Indeed, the guidelines merely placed chiropractors in the same position they would have occupied if the medical profession did not exist.

Finally, the Opposition extensively relies (*e.g.* Opp. 17-19) on the findings that the guidelines raised chiropractors' costs, re-

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its ethical ban following the emergence of a small group of reform chiropractors who renounced the tenets of chiropractic and so confine their practices (Tr. 1975-79, 2029-30)—as the four plaintiffs have not. *E.g.*, Tr. 1933-69, 1032-39; Petition, pp. 4-5.

duced the "efficiency" of their operations, and decreased demand for their services. They claim that these adverse effects establish harm to competition and an antitrust violation, despite the conceded absence of adverse effects on price or output. *See* p. 2 n.1, *supra.* This is wrong as a matter of law. *See* Petition 21 & 23 n.14.

The reality is that any ethical guideline, standard, or statement against the use of an unscientific or dangerous practice will raise costs, reduce demand, and reduce incomes of proponents of that practice. This is so whether the practice is the use of Laetrile to treat cancer, the use of faith healing to cure heart disease, or the use of a standard in the manufacturing of screws. *See* R. Bork, *The Antitrust Paradox,* p. 333. If proof of adverse impact on a class of individuals were sufficient to establish an antitrust violation or even to shift the burden of proof to defendant, no ethical guideline or private standard could survive antitrust scrutiny. That would altogether prevent the efficiencies, and consumer welfare benefits, that these arrangements indisputably can offer. *See id.*

2. The second question presented in the Petition is whether the First Amendment permits a court to rely on informational and legislative activities in finding either a past antitrust violation or a sufficient risk of recurrence to justify an injunction.

Contrary to respondents' misstatements (Opp. 15-16, 20), the AMA has never contended that the First Amendment protects the ethical guidelines that were here found to constitute evidence of a "conspiracy" among AMA members. Rather, the basis for the First Amendment claim is that the courts below relied on the AMA's wholly separate public information and legislative campaign that was directed at legislators, consumers, and voters and that was designed to obtain legislation containing and ultimately eliminating chiropractic.

Notably, respondents do not dispute that the lower courts pervasively relied on this campaign in finding liability and justifying

an injunction and that this is contrary to the holdings of other courts of appeals. *Compare* Opp. 21-23, *with* Petition, 25-28. In particular, respondents do not dispute that the courts relied on pure speech: the AMA's statements criticizing chiropractic and its failure to "retract" these statements.

For these reasons, the Petition For A Writ Of Certiorari should be granted.

Respectfully submitted,

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October 31, 1990

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